IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-650

STATE OF NEW MEXICO, R. LEE AAMODT, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, PUEBLO DE SAN ILDEFONSO, PUEBLO DE POJOAQUE, PUEBLO DE NAMBE, PUEBLO DE TESUQUE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF INDIAN PUEBLO RESPONDENTS IN OPPOSITION

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I. INTRODUCTION

The petition for a writ of certiorari on this interlocutory appeal should be denied. The full record is not now available to the Court. If the matters presented remain in issue at the conclusion of the trial, they may be considered upon the full record. Moreover, the questions presented by the petition are insubstantial and do not warrant review at this time.

The petition raises a question concerning the identity and therefore the standing of some of the petitioners, who purport to comprise "several hundred private landowner defendants in the Court below." In fact, the great majority of the defendants have consented to judgments with the plaintiff State of New Mexico on the nature and extent of their rights. It is doubtful that those defendants have now authorized one or more of the petitioning attorneys to represent them in this interlocutory appeal, and the record does not show how many of the individual defendants are in fact represented by the petition, nor which (if any) of the signing attorneys represent them. Clearly, the attorneys for the petitioner State of New Mexico, plaintiff in the Court below, cannot represent the interests of any of the individual defendants herein.

II. STATEMENT OF PURPOSE AND BACKGROUND

The questions presented by the petition must be considered in the context of this water adjudication suit and the unique legal history of the Pueblo tribes in relation to the petitioner State of New Mexico. Petitioners state (p. 17) that the purpose of the action is "purely one to determine the nature, extent and priority of all rights of all claimants to waters of the Rio Nambe, under all applicable law." The decision of the Circuit Court is wholly consonant with that purpose. It decided that federal law controls the Pueblo's water rights, and that a specific federal law clearly assigns priority to certain of those rights. It requires the District Court to consider further evidence on the issue of priority and on all other factual questions, and thus does not foreclose (as did the District Court's prohibitive rulings) any of the important issues either

from further litigation or later appeal. The Circuit Court's decision also ensures that the Pueblos will have adequate representation by independent counsel of their separate proprietary interests as opposed to the Government's interests both as their trustee and as proprietor of other lands in the same watershed. The right to such representation affirmatively supports and is in no way inimical to the State's expressed purpose in initiating the water adjudication suit.

Since the Circuit Court's decision is inimical neither to the purpose of the petitioner State of New Mexico nor to a later appeal, its precipitate action in seeking immediate review may be difficult to understand except in the light of the unique and tragic history of the Pueblo's relations with the State. About twenty years after the assumption of U.S. sovereignty over New Mexico in 1848, the Territorial Courts preempted jurisdiction over the Pueblos and their lands. That jurisdiction was mistakenly affirmed by the U.S. Supreme Court in *U.S.* v. *Joseph*, 94 U.S. 614 (1876), which later recognized the mistake and reversed itself, on grounds that it had been misled, in the landmark decision of *U.S.* v. *Sandoval*, 231 U.S. 28 (1913). The territorial government, and later the state, maintained then, and the state continues to this day to maintain, that the Pueblos are different from other Indian tribes and do not need the same federal protections. The circumstances that the Pueblo Indians were permanently settled in villages, and that the Spanish Crown had for this reason granted them land and special protections not unlike the Federal trusteeship, were used as reasons for denying their status as Indians under Federal jurisdiction. The *Sandoval* decision held that the Pueblos were indeed Indians, that their need of

federal protection was just as great as that of all other recognized tribes, and that federal trust responsibility had been established at the inception of U.S. sovereignty.

The proof of the Pueblos' need of Federal protection is the huge loss of valuable irrigated land they suffered during the period from *Joseph* (1876) through *Sandoval* (1913). The vast majority of the "hapless non-Indian landowners" to which the petition refers (p. 10) are the successors in interest to the non-Indians who acquired (wrongfully, as it turned out) land interests within the Pueblos during this period. The legal basis of their present titles is the Pueblos Lands Act of June 7, 1924 (43 Stat. 636). This law was enacted for the express purpose of adjusting the various land claims within the Pueblos. The basic premise upon which the Act was founded was a recognition that without an act of Congress the non-Indians who had settled within the Pueblos had no valid land interest at all. The entire scheme was a clear recognition that *Joseph* was wrong, *Sandoval* was right, and that the Pueblos' land and water rights were governed by federal law, to the exclusion of state law.

The one remaining undefined resource of the Pueblos today is their water. The District Court's ruling (Exhibit A hereto) in favor of the state's doctrine of prior appropriation echoes the repudiated *Joseph* decision of 1876, and had it been allowed to stand gave promise to the State and its non-Indian allies of a similar disastrous result for the Pueblos' water rights. The Circuit Court, informed by an expertise and knowledge of Pueblo history born of its direct experience in the many cases appealed to it under the Pueblo Lands Act,

recognized that the issue of jurisdiction is fundamental to any determination of Indian rights. In seeking now a further, unnecessary and untimely appeal, petitioners betray their true objective of defining the Pueblos' water rights according to the same limitations as non-Indian rights under state law rather than "under all applicable law" as the Petition states. It is the same spurious argument that was made in *Joseph* with respect to Pueblo lands, but its success in the District Court, combined with the spoils won under *Joseph,* may help to explain the otherwise puzzling timing of the petition.

III. REASONS FOR DENYING THE WRIT

1. The Circuit Court Correctly Sustained the Right of the Indian Pueblos To Participate in the Adjudication with Private Attorneys of Their Choice.

The Circuit Court recognized that these four Indian Pueblos, which have been plaintiffs-in-intervention in the water adjudication suit since 1967, have the legal right to be represented by independent private counsel of their choice. The Petition's assertion that the District Court's denial of the Pueblos' right to participate as plaintiffs-in-intervention through independent private attorneys of their choice was "discretionary" and "an exercise of basic fairness" is a wholly false issue. The United States provided independent private attorneys to protect the proprietary rights of the Pueblos where the Government is also asserting its own proprietary rights in the watershed. The District Court had no power to deny the Pueblos the right to independent representation of their proprietary interests, as distinguished from representation by the Justice Department of the Government's interest as trustee. *U.S.* v.

Heckman, 224 U.S. 413, 446 (1912), stated that the federal courts must accept the executive branch's determination of how the separate interests of the United States and Indian tribes shall be represented in litigation:

> "In what cases the United States will undertake to represent owners of restricted lands in suits of this sort *is left, under the act of Congress, to the discretion of the Executive Department. The allottee may be permitted to bring his own action, or, if so brought, the United States may aid him in its conduct, as in the Tiger case.*" [Italics added.]

Had the United States failed in this instance to provide independent representation for the Pueblos, the Justice Department would be in the position of serving as sole counsel for the potentially conflicting interests of the Department of Agriculture as proprietor of the National Forests, the Department of the Interior as trustee for the Indians, and four Indian Pueblos each of which is a separate and distinct proprietor of lands at different locations within the watershed. Although the Petition attacks (footnote, p. 19) the affidavit of the Commissioner of Indian Affairs by suggesting that the potential conflict was not a real consideration, the Commissioner stated explicitly in his affidavit that it was. A copy of the affidavit is attached as Exhibit B. Petitioners' argument that the Government itself recognized that its priority is later than the Indians' (footnote, p. 6) is equally specious; even if that recognition were binding and absolute, priority is only one of several contestable attributes of the water rights of the parties.

2. The Circuit Court Correctly Construed Applicable Acts of Congress Defining the Water Rights of Indian Pueblos.

The key statute by which Congress defined the water rights of the Indian Pueblos, is Section 9 of the Act of March 31, 1933, 48 Stat. 111:

> "Nothing herein contained shall in any manner be construed to deprive any of the Pueblo Indians of a prior right to the use of water from streams running through or bordering on their respective pueblos for domestic, stock-water and irrigation purposes for lands remaining in Indian ownership, and such water rights shall not be subject to loss by non-use or abandonment thereof as long as title to said lands shall remain in the Indians."

The Circuit Court's opinion reflects its special experience with the unique and tragic history of the Pueblo Indians and Congress' intention to prevent loss of their water rights, as their lands had been lost when the protections of federal law had mistakenly been held inapplicable (see Part II above). The Court correctly interpreted Section 9 as establishing for the Pueblos a prior right to the use of water for domestic, stock-water and irrigation purposes of lands remaining in Indian ownership.

The Circuit Court thoroughly examined and considered the legislative history of the 1933 Act and the Pueblo Lands Act of 1924. It characterized the petitioners' arguments as "unconvincing" and as "implied from a tortuous construction" of the record. Respondents would be less charitable: petitioners deliberately misrepresent the legislative history of Section 9 of the 1933 Act. A notably flagrant instance is their quoting (p. 14)—in support of their interpretation of Section 9 as a "neutral savings clause"—statements from com-

mittee reports in the 72nd Congress, which were deleted from the committee reports of the 73rd Congress on the bill as passed. H. Rep. No. 123 and S. Rep. No. 73, 73rd Cong. 1st Sess. Moreover, it is clear that Congress did not repudiate the "Winters Doctrine" as an "erroneous theory." The "erroneous theory" referred to in committee reports was the Pueblo Lands Board's theory that paying the Indians $35 per acre for irrigated lands confirmed to non-Indians, rather than the $100 per acre determined by the Board's appraisers, was somehow justified as protection of their remaining rights. The colloquy between Senator Bratton, whose sentiments on Indian rights are obvious, and John Collier, who at that time was neither formal counsel for the Indians nor a government official, is lifted out of context and does not represent the view that prevailed in the final legislation.[1] The legislative history is clear and unambiguous that, as the Circuit Court held, Section 9 was added to the Act to forestall any implication that the Pueblos did not enjoy prior and paramount water rights comparable to those established under *Winters* v. *U.S.*, 207 U.S. 564 (1908), for other Indian tribes.

Petitioners' reference to the Act of March 13, 1928, 45 Stat. 312, is also misleading. That Act protected six other Pueblos—none of which is a party here—located within the boundaries of the Middle Rio Grande Conservancy District. It required the District to recognize the prior rights of the Pueblos in delivering District water for irrigation of lands already under

[1] The representations of Mr. Collier as quoted by petitioners cannot by any stretch of the imagination be construed as the "legal position [of respondents] 40 years earlier" (Petition, pp. 15-16).

cultivation and not to discriminate against the Pueblos with respect to District water supplied for new irrigation of additional Indian lands. The Act did not purport to define the water rights of the Pueblos, and its provisions regarding deliveries of District water to Indian lands by the District are entirely compatible with the definition of Pueblo water rights in Section 9 of the 1933 Act.

3. The Circuit Court Correctly Decided the Relative Priorities of the Pueblos and Private Landowners.

This interlocutory appeal was accepted by the Circuit Court to determine the legal definition of the Pueblos' water rights before presentation of extensive historical and hydrological evidence at the trial. The District Court's letter (Exhibit A hereto) by placing the Pueblos under the State's doctrine of prior appropriation, would have limited the Pueblos' proof to "their historical uses in existence at the time of the Spanish conquest" or thereafter (Petition, p. 9) and precluded introduction of evidence of the irrigation requirements for "lands remaining in Indian ownership" under Section 9 of the 1933 Act. The District Court also rejected certain evidence concerning the water rights of the Pueblos under Spanish colonial law. Since the District Court's order conflicted with the fundamental principle that the water rights of the Pueblos are defined solely by federal law and had ignored Section 9 of the 1933 Act, the Circuit Court reversal required reception at trial of the evidence offered by the Government and by the Pueblos but rejected by the District Court. It is wholly incorrect to say that the "same evidence was fully considered by the District Court" (Petition, p. 16).

The doctrine of state law erroneously imposed by the District Court, and the petitioners' "tortuous construction" of the 1933 Act in support of that doctrine, placed the issue of priority under Section 9 squarely before the Circuit Court. In considering the language of that Act, the Court held that Section 9's recognition of the Pueblos' "prior rights" necessarily made their water rights as a matter of federal law "prior to all non-Indians whose land ownership was recognized pursuant to the 1924 and 1933 Acts."

Petitioners admit that, "The prehistoric water rights priority of the Pueblos has never been disputed by the Petitioners." (Petition, p. 14). It is, therefore, unclear why petitioners complain of the Circuit Court's determination that the Pueblos' priority under federal law is senior to the rights of the non-Indians under state law. Moreover, they do not assert that they were prevented from challenging the Pueblos' priority position under federal law. They clearly could have done so but chose instead to rest on the affidavits annexed to petitioners' motion for summary judgment (Petition, p. 16, n. 6), which had been denied by the District Court in August 1973 (Petition, p. 8).

4. The Petition Is Untimely and Unwarranted.

Petitioners do not assert that the Circuit Court's determination of the relative priorities under the 1933 Act is incorrect. Since the Circuit Court remanded for trial on a full presentation of evidence, priorities that may be determined by Spanish or Mexican law (for rights arising before 1858) will be fully litigated. This Court obviously cannot make any final disposition of the priority issues on this interlocutory appeal before those later proceedings have been completed.

The decision below is not in conflict with that of any other court of appeals, the petition presents no substantial federal question, and review of an interlocutory decision is both untimely and unwarranted. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 7, 1976

APPENDIX

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
ALBUQUERQUE, NEW MEXICO 87103

H. VEARLE PAYNE, *Chief Judge*

September 17, 1974

TO ALL COUNSEL OF RECORD AND THE SPECIAL MASTER:

RE: STATE v. AAMODT
No. 6639 Civil

Gentlemen:

It is the Court's understanding that the trial in this matter before the Special Master was tentatively scheduled to resume on September 23, 1974. Therefore, it is imperative that the Court address itself to certain matters which have developed in this case prior to any resumption of the trial.

On June 10, 1974, a Motion for Pretrial Order and Proposed Pretrial Order was filed. A response in opposition by the State of New Mexico and certain private defendants was filed on June 17, 1974. Apparently the Special Master conducted a hearing on this matter on June 20, 1974. On July 5, 1974, the Special Master addressed a letter to all counsel of record which was subsequently filed as of record on July 22, 1974. Therein the Special Master states that the "pretrial order dated ....., 1969, is the pretrial order controlling this case" and further that he is rejecting the motion for pretrial order filed June 10, 1974, "except as to the inclusion of the additional witnesses . . . ", As a result of that letter the State of New Mexico and some private defendants filed their exceptions and objections to the Special Master's decision stated in the July 5, letter. (It is interesting to note that *two* responses to the exceptions and objections of the state and private defendants were filed. One response was filed on August 12, 1974, and signed by the Assistant U. S. Attorney of Albu-

querque and the Department of Justice attorney. Then two days later, on August 14, 1974, the "response of Indian plaintiffs to exceptions and objections of the State of New Mexico and non-Indian defendants" was filed and signed by the three "new" attorneys. This question of the position of the three private attorneys will be discussed later in this letter.) Subsequently, the Court held a hearing on August 15, 1974, concerning the exceptions and objections of the State and the private defendants to the ruling of the Special Master in his July 5, letter. At that hearing several questions surfaced concerning confusion which evidently had been brewing ever since the Court's letter of August 28, 1973. Currently the Court feels it must rule on two very basic but nonetheless extremely important questions of which the Court became aware at the August 15, hearing. The Court called for briefs of these questions and has been in receipt of these briefs concerning the respective positions in this matter. It seems the Court must determine:

1. Whether the Court should now enter an interlocutory order determining as a matter of law that the water rights of the Indian Pueblos are to be determined by the doctrine of prior appropriations, and consequently, if such an order is allowed, how should the record be completed for purposes of an interlocutory appeal? (It would seem the primary question on the completion of the record would concern whether or not the Court should allow testimony by the proposed additional witnesses not listed in the 1969 pretrial order.)

2. What the "new" attorneys' position is in this litigation?

The Court will address itself to the former question first.

The Court wrote a letter concerning this case on August 28, 1973. It seems there has been some differences of opin-

ion about the meaning of that letter. The Court regrets if it was not explicit enough in that letter. Hopefully what follows will clarify the apparent confusion.

By means of a letter the Court wrote on July 6, 1973, and the aforementioned August 28, letter, the Court thought that it had ruled that the prior appropriations doctrine should be the principle upon which the water rights were to be adjudicated. Evidently, the attorneys cannot agree on what the Court desires.

In the letter of July 6, 1973, the Court did state that the questions were "of such importance that they should not be decided by summary judgment and that the matter should be left open for all parties". The import of that statement and the August 28, letter was that the Court was going to sustain the Special Master's ruling as to the summary judgment question in order that all evidence as to *all* legal theories (whether those legal theories be the prior appropriations doctrine, the Winter's Doctrine, or some other type of preferential water rights theory) could be tendered. It was reasoned by the Court that, by permitting all offers of proof, on whatever theories, the record would contain the position of both sides so the Appellate Court would have before it a complete and comprehensive record upon which to decide whether the prior appropriations doctrine or some other theory applied as to the determination of the Pueblos' water rights. However, it was the further intention of the Court by the July 6 and August 28 letters, to make it clear to all parties and the Special Master that the Court was going to *ultimately* decide the question only on evidence relevant to the prior appropriations doctrine.

In the third paragraph of the letter of August 28, the Court states "My only purpose in writing this letter is for the guidance of the Special Master and attorneys." Near the end of that same letter the Court states "I realize that those matters are not really before me at this time

but I am merely stating my view so that the Special Master may be guided by what I have said."

At that time the Court was attempting to state that the Special Master was correct in his rulings as to the motion for summary judgment. It appeared at that time that if summary judgment was granted, even offers of proof as to the other legal theories would be inappropriate. Therefore, the Court reasoned that the Motion for Summary Judgment should be denied, that all evidence should be in the record and that an offer of proof could be made as to evidence on other than the prior appropriations doctrine for purposes of completing the record. However, the Court further reasoned that the case would be decided finally on the prior appropriations theory. The Court, though, at that time, did not anticipate additional witnesses other than those listed in the 1969 pretrial order.

At this moment the Court would like to state that it has nothing but the highest respect for the handling of this case by the Special Master and the Court takes all blame as to any confusion which it may have caused by its reasoning in the July 6 and August 28 letters.

Now, turning to the direct question of interlocutory appeal. It should be noted from the outset that there is a general Federal policy against interlocutory or "piecemeal" appeals. *See Switzerland Cheese Ass'n. Inc., vs. E. Horne's Market, Inc.,* 384 U.S. 23 (1966). However, the Court is of the opinion that an immediate appeal concerning the legal theory upon which the water rights of the Pueblos is to be determined would materially advance the ultimate termination of this litigation. The Court has considered the entire matter and reasons that the case should be brought to an end at the earliest possible date. It would further appear to the Court that this "earliest possible date" would be much facilitated if the case was now brought to an appealable posture on the question of which legal theory to apply. Accordingly, it appears to the Court

that the matter should be "whipped into shape" so that it can be taken up to the Circuit on an interlocutory appeal.

The next problem is how best to prepare the record in order to facilitate the appeal. Herein is posed the question of whether or not to allow the additional witnesses, listed in the proposed pretrial order of June 10, 1974, to testify.

The Court stated in its letter of April 26, 1974, which was concerned with granting the extension of six months in which to begin the trial as requested by the "new" attorneys, "the Court did not intend to interfere with procedural matters". The Court is aware that what is now before it concerning the additional witnesses could be labeled a procedural matter. However, the Court must now, with all due respect to the Special Master, concern itself with this procedural matter.

During the hearing on August 15, 1974, the State took the position that if the additional witnesses were allowed to testify, there would be the matter of deposing the witnesses, probably seeking other witnesses to oppose them and that, all in all, it would possibly take another two years before the case would be ripe for final adjudication.

Some lawyers who represented private parties stated they had been waiting a long time for an adjudication of their rights and that they should be adjudicated promptly. Their position was that a postponement of justice might be a denial of justice. It is the Court's position that the Government and the Pueblos', as previously mentioned in this letter, should be allowed to make an offer of proof so that the entire matter would be before the Circuit. However, the Court does not feel that the offer of proof should be done by taking the testimony of any witnesses except those which were named in the original pretrial order. To rule otherwise would mean that the original pretrial order was not binding on the parties, and of more importance,

that undue delay would result. The Court is aware of *Sill Corporation v. U. S.*, 343 F.2d 411 (1965), and *Case* v. *Abrams,* 352 F.2d 193 (1965), the two decisions cited by counsel for the State and the private defendants, as well as other authority. The Court interprets this authority to infer that the instant case is not a proper case in which to allow the amendment of the original pretrial order to include the additional witnesses.

The trial judge is vested with broad discretion in considering when a pretrial order should be amended. See *Bettes* v. *Stonewall Ins. Co.,* 480 F.2d 92 (1973). Also, *see Monod* v. *Futura, Inc.,* 415 F.2d 1170 (10th Cir. 1969). Further, it is stated in Rule 16 of the Federal Rules of Civil Procedure that "such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice". The Court finds much comfort in this statement: "A Court should be liberal in allowing amendments where a failure to amend might result in grave injustice, whereas the allowance of an amendment will cause no substantial injury to the opposing party and the inconvenience to the Court will be slight." 62 Am.Jur. 2d, Pretrial Conference, Section 37.

It appears to the Court that no grave injustice will result by denying the amendments sought in this case. The Government and the State and the private litigants have (or if not should be allowed to) present all evidence on their opposing legal theories concerning prior appropriations, the Winter's Doctrine or some other preferential right theory *as listed in the original pretrial order.* It does seem that to allow the amendment of the pretrial order would cause substantial injury or at least be highly prejudicial to the position taken by the State and private defendants unless, of course, the Court allowed the additional time, possibly two years or thereabouts, for the State and private defendants to prepare rebuttal to the proposed additional witnesses. Such occurrence would be more than

a slight inconvenience to the Court as well as all concerned. The Court is aware that the proposed new witnesses Dobkins and Taylor, the new material prepared by the old witness Ellis, as well as the other "new" witnesses listed in the proposed amended pretrial order may have very important and revealing information on the question of whether the Pueblos had a type of preferential water right. However, if the time was allowed possibly the State and private defendants advocating prior appropriations might come up with just as persuasive authority for their position which would rebut the above mentioned witnesses. It simply does not seem fair and possibly even an instance of "manifest injustice" to allow an offer of proof by the Government by new witnesses to go up on appeal which the opposing counsel has not been provided the opportunity to adequately rebut. Furthermore, and possibly of the most importance, the Court reasons that there is ample record on all positions based on the evidence listed in the original pretrial order for the Circuit to consider. In effect, the Court does not want a changing of the witnesses in the "middle of the stream" for all the reasons stated. Therefore, the Court is, with all due respect to the Special Master, ruling that the original pretrial order must stand as to the original witnesses and that any additional witnesses may not be used for any purpose. There may be a question of substituted witnesses. For example, Dr. Gorman for Dr. Burkette would seem acceptable. However, as to the "expert in Spanish Law-History" or "other" suitable replacement, it seems at this late date that opposing counsel have not deposed these additional witnesses and do not know what they would testify to nor do they have ample opportunity to oppose and rebut the testimony. Further, it appears Dr. Jose Fuentes Mares was the expert on Spanish Law-History and that he testified for the Government on these matters. However, it will be for the Special Master to rule on the particulars of whether a certain witness is a "new" witness or merely a substitute, etc. The

Court has ruled and believes that, this time, its ruling is clear. The 1969 pretrial order is to control all matters in this case and no new witnesses are to be allowed. The Special Master and counsel can work out the details of what should be in the transcript of the record.

The Court acknowlwedges receipt of the letter from Mr. Bloom dated September 11, 1974. The Court does not feel and must presume that the counsel who submitted the material on September 9, 1974, did not intend to influence the Court ex parte. Regardless, the Court did not consider any of the affidavits or reports attached to the "brief of the United States and Indian plaintiffs". As for the additional arguments on what is the appropriate legal theory to apply, the Court has already stated its position that prior appropriations is the correct doctrine. Both sides will have more than ample opportunity to argue the point to the Circuit Court.

There seems to be some question on how this matter should be appealed. That is, whether it should be done via 28 USC 1292(b) or Rule 54(b) of the Federal Rules of Civil Procedure. Couldn't the attorneys, in conjunction with the Special Master, at least determine and agree which would be the most appropriate vehicle and similarly agree on an order? The Court reasons that 1292(b) seems to be the more correct method. We are not concerned with a "final" judgment of a "claim" but rather we are concerned more with a "controlling question of law". In fact the claims cannot be finally adjudicated until the Court determines which legal theory to apply. Counsel for the State propose an instruction to the Special Master concerning holding in abeyance any further proceedings and the submission to the Court by the Special Master of a transcript of the record. Couldn't this likewise be adequately handled in a 1292(b) order? Therefore, on the presumption that all evidence as listed in the original pretrial order has been presented as concerns the correct legal

theory to apply, the Court requests that the necessary order, or orders, and other necessary material be prepared by all counsel in cooperation with the Special Master. Of course, this presumes that the record is complete at this stage. However, as aforementioned it is for the Special Master to rule on the particulars on whether all pertinent witnesses as of the original pretrial order have testified and whether the record is complete for purposes of the appeal as concerns the correct legal theory in this case.

The second question which came before the Court at the August 15, 1974, hearing was the position of "new" attorneys.

The Court is aware of *Heckman* v. *United States,* 224 U.S. 413 (1912), which is cited in both briefs currently before the Court. Also, the Court considered the Tenth Circuit opinion of *Pueblo of Picuris* v. *Abeyta,* 50 F.2d 12 (1931).

The Court feels that any attorney may represent the tribes *if* the tribes take some position contrary to that which has been taken by their attorneys in the past. However, the tribes have not filed a complaint in intervention and, in fact, it is difficult to understand how the Pueblos could intervene again in a case which they have been the plaintiff-intervenors since 1967. Further, the Pueblos have not filed any pleadings to take issue with the position of the Government attorneys. Under the circumstances of this case, it is simply not correct procedure for the additional counsel to, in effect, separately and independently represent the tribe which are already represented by Government counsel whether that separate and independent representation be in briefs, during cross-examination of witnesses, etc. For example, in any hearing the "new" attorneys should not be permitted to cross-examine a witness if a witness has already been cross-examined by the Government. Also, as noted in this letter at page one, two *separate* briefs were filed in response to the State and pri-

vate defendants exceptions and objections to the Special Master's July 5, letter, one brief by the "new" attorneys and one brief by the Government attorneys. This is not to say that the new counsel cannot participate as co-counsel. However, in terms of the vernacular the Court used at the August 15, 1974, hearing, which is very apropos to the situation under the pleading as they stand in this case, the Pueblos cannot have "two bites out of the apple". Therefore, when the Circuit Court has ruled on this question of whether the prior appropriation doctrine or some other doctrine should be applied, we can then go ahead and wind up the case. However, this ruling concerning the new and Government attorneys will remain the same unless the Circuit Court rules to the contrary.

This letter presumes that the September 23, resumption of trial is vacated unless the Special Master determines that the record is not complete as concerns all applicable evidence as listed in the 1969 pretrial order. The Special Master may, on that day, prefer to meet with counsel concerning how best to draft the orders, etc., necessary for this matter to go up on appeal, however, these matters are for the Special Master's consideration.

The Court hopes this letter clears up some of the apparent confusion which has arisen in the past. Also, the Court will appreciate prompt attention to the necessary preparations for the appeal.

Sincerely,

/s/ H. VEARLE PAYNE
H. Vearle Payne

EXHIBIT B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 1069

STATE OF NEW MEXICO, *Co-Respondent,*

v.

R. LEE AAMODT, ET AL., *Co-Respondents*

PUEBLO DE SAN ILDEFONSO
PUEBLO DE POJOAQUE
PUEBLO DE NAMBE
PUEBLO DE TESUQUE
Petitioners

Affidavit

Morris Thompson, being first duly sworn, deposes and says:

1. I am presently Commissioner of Indian Affairs of the United States Department of the Interior. I was appointed to this post by the President, confirmed by the United States Senate on December 3, 1973, and have served continuously since that date.

2. I have been informed that the Pueblos of Tesuque, Pojoaque, Nambe, and San Ildefonso are taking an appeal to the Tenth Circuit Court of Appeals from the Order of the District Court in *State of New Mexico* v. *Aamodt,* No. 6639—Civil (D. N.M.) entered on December 6, 1974, denying the private attorneys for such Pueblos the right to represent them separately and independently from the attorneys for the United States and striking *sua sponte* a Complaint-in-Intervention filed by such Pueblos on November 12, 1974. I am giving this affidavit because I believe that these decisions interfere with important actions by the Bureau of Indian Affairs in fulfillment of the trust

obligations of the United States to protect its Indian wards and their property, including water rights.

3. The issues raised by the *Aamodt* case concerning the water rights of the four Indian Pueblos have long been of concern to officials at the highest levels of the Department of the Interior. We believe that the ultimate decision by the courts in this case will have far-reaching consequences as a judicial precedent, affecting the other 15 New Mexico Pueblos and perhaps Indian tribes in other states.

4. Conflicts of interest often arise between the trust obligations of the United States and the programs and policies of various federal agencies. On the one hand, the United States has a strict fiduciary obligation to protect and preserve Indian rights to natural resources, including rights to land, water, minerals, timber and to hunt and fish. On the other hand, certain federal agencies are charged by statute with administering programs that conflict with Indian claims to these same natural resources. In this *Aamodt* case, for example, the United States Forest Service has assembled a claim to water in the same watershed involved in the litigation. Allegations have also been made that other federal agencies would profit from restricting the water rights claims of these four Pueblos. Irrespective of the ultimate validity of these allegations, I believe it is important for the United States to avoid even the appearance of a conflict of interest in a case of such far-reaching significance.

5. For the above reasons, the Bureau of Indian Affairs has in this instance, as in other similar cases, decided that private counsel independent of any possible conflict of interest should be furnished to represent the Indian interests. The Bureau's Albuquerque Area Director approved a special attorney contract on March 28, 1974, pursuant to which the three attorneys could be funded to represent the Pueblos in the *Aamodt* litigation.

6. The Bureau of Indian Affairs has provided all funds for the services, disbursements, and expenses of these attorneys. It was contemplated that the private attorneys would cooperate with, but would be independent from, the Government's attorneys in the Department of Justice. Those were deliberate actions to fulfill the Government's trust obligations to the Pueblos.

7. The Order entered by the District Court on December 6, 1974, defeats the intention and actions of the Bureau of Indian Affairs—that Government's trust responsibilities to the Pueblos in this case shall be discharged by providing private counsel of the Indians' choice to work in cooperation with, but independently from, the attorneys of the Department of Justice.

8. The decisions described above on behalf of the United States as trustee were made in the sound discretion of the Bureau of Indian Affairs under the legal mandate of Congress and the Courts to function as a trustee for the protection of Indian rights and property. They are, in my opinion, essential to the implementation of the trust obligations of the United States in this *Aamodt* case.

/s/ Morris Thompson
Morris Thompson
Commissioner of
Indian Affairs